

**Remarks /Arguments**

Claims 26 and 29 have been cancelled, thus rendering the Examiner's rejection of these claims under 35 U.S.C. § 112, ¶ 2 moot.

Claim 5 has been amended to remove a comma. It is respectfully submitted that this amendment does not affect the scope of claim 5.

Claims 37 and 38 have been added. Support for these claims can be found in paragraphs 0019 and 0020.

Claims 1 to 4, 6 to 9, 12 to 16, 24, 25, 30, 31, 32, 33, 35 and 36 were rejected under 35 U.S.C. §103(a) as being unpatentable over Gust (US 3,123,868) in view of Smith (US 3,046,613) and LaBrosse (US 6,052,959). Claims 1, 2, 4 to 7, 9, 10, 12, 13, 15, 24, 25, 26, 28 and 30 were rejected under 35 U.S.C. §103(a) as being unpatentable over Mackes (US 4,330,500) in view of Smith (US 3,046,613) and LaBrosse (US 6,052,959). Claims 3, 8, 11, 14, 16, 27 and 33 were rejected under 35 U.S.C. §103(a) as being unpatentable over Mackes (US 4,330,500) in view of Smith (US 3,046,613), Hoyt (US 3,413,769) and LaBrosse (US 6,052,959). Reconsideration of the application is respectfully requested.

**The Rejection of Claims 1 to 4, 6 to 9, 12 to 16, 24, 25 and 30  
in view of Gust, Smith and LaBrosse**

Claims 1 to 4, 6 to 9, 12 to 16, 24, 25 and 30 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Gust (US 3,123,868) in view of Smith (US 3,046,613) and LaBrosse (US 6,052,959).

Claim 1 recites: "A protector for a window well comprising:  
a hood formed in the shape of quarter sphere comprising a first and second portion, the first portion of the hood about perpendicular to a base and further comprising a plurality of slits,  
the second portion sloped to deflect precipitation from the first portion and the slits."

Claim 2 recites: “A protector for a window well comprising:

a hood formed in the shape of quarter sphere comprising a first and second portion, the first portion of the hood about perpendicular to a base and further comprising a plurality of slits, the second portion sloped to deflect precipitation from the slits;

a first outward rim flange extending from the top of the hood for securing the hood to a foundation; and

a second outward rim flange extending from the bottom of the hood for covering the window well.”

Claim 3 recites: “A protector for a window well comprising:

a hood formed in the shape of quarter sphere comprising a first and second portion, the first portion of the hood about perpendicular to a base and further comprising a plurality of slits, the second portion sloped to deflect precipitation from the slits;

a first outward rim flange extending from the top of the hood for securing the hood to a foundation and comprising a plurality of securing members; and

a second outward rim flange extending from the bottom of the hood for covering the window well.”

Claim 24 recites: “A protector for a window well comprising:

a hood formed in the shape of quarter sphere comprising a first and second portion, the first portion of the hood connected to a base and further comprising a plurality of slits, the second portion sloped to deflect precipitation from the slits;

a first outward rim flange extending from the top of the hood for securing the hood to a foundation; and

a second outward rim flange extending from the bottom of the hood for covering the window well.”

Claim 30 recites: “A protector for a window well comprising:

a single-piece structure including a hood formed in the shape of quarter sphere comprising a first and second portion, the first portion of the hood about perpendicular to a base

and further comprising a plurality of slits, the second portion sloped to deflect precipitation from the first portion and the slits.”

In rejecting claims 1 to 3, 24 and 30, the Examiner recognizes that Gust fails to disclose the claimed plurality of slits in the hood, and looks to Smith and LaBrosse to cure this deficiency.

U.S. Patent No. 3,123,868 to Gust purports to describe a window well cover. In particular, Gust explains:

“Mounted circumferentially in the lower portion of the dome 12 . . . is a substantially U-shaped or semicircular base bar 13 of suitable metal” (Gust, col. 1, lines 65 to 68).

“The bar 13 is substantially T-shaped in cross-section, said bar including on its outer periphery a circumferentially extending flange 15” (Gust, col. 1, lines 70 to 73).

U.S. Patent No. 3,046,613 to Smith also relates to a window well cover. Smith explains that:

“In the arrangement illustrated in Figures 1 and 2 it is preferred that the side wall 32 shall be of a perforated metallic material as for example, expanded metal of the expanded lathe type or sheet metal having apertures, passages, or slots therethrough of a screen-like or grid-like character” (Smith, col. 3, lines 21 to 27).

“By virtue of the periphery of the cover overlying the upper edge of the side wall 32 of the window well enclosure, the cover serves to protect the ingress of rain through the ventilating openings in this side wall. In turn, the side wall by reason of its upwardly and outwardly flaring contour overhangs and projects laterally beyond the rim 24 of the window well retaining wall 22 further preventing rain being blown into the well.” (Smith, col. 3, lines 14 to 21).

“A further modified construction is illustrated in Figure 5 . . . . In the arrangement of Figure 5, an “apertured metallic side wall of the enclosure operates as a protective means for the well while the plastic inner wall serves to close the perforations in the outer wall and thus completely protect the window well from ingress of rain, snow or the like” (Smith, see col. 3, lines 62-63, 69- 74).

U.S. Patent No. 6,052,959 to LaBrosse does not relate to a window well cover. Rather, LaBrosse “relates to a device for releasing trapped moisture sealed within a structure by a

STYROFOAM-backed exterior insulation and finishing system” (LaBrosse, col. 1, lines 7 to 10). A stated objective of LaBrosse “is to provide a moisture vent for use with exterior insulation and finishing systems (LaBrosse, col. 1, lines 48 to 50). Another alleged object of LaBrosse is “to provide ventilation to a structure for the prevention of an accumulation of moisture on a backing of an exterior insulation and finishing system” (LaBrosse, col. 1, lines 51 to 54). Yet another alleged object of LaBrosse is “to prevent the entrance of termites into a backing of an exterior insulation and finishing system” (LaBrosse, col. 1, lines 55 to 57).

It is respectfully submitted that it would not have been obvious to one having ordinary skill in the art at the time of the invention to modify Gust’s protector to show a plurality of slits in view of Smith and LaBrosse as asserted in the Office Action.

Smith does not teach or disclose a “first portion of the hood . . . comprising a plurality of slits” as claimed. Rather, Smith clearly states that “it is preferred that the side wall 32 shall be of a perforated metallic material . . . having apertures, passages, or slots therethrough of a screen-like or grid-like character.” Moreover, in the arrangement of Figure 5 of Smith, ventilation of the window well is not provided for at all since a “plastic inner wall serves to close the perforations in the outer wall and thus completely protect the window well from ingress of rain, snow or the like” (see col. 3, lines 71 to 74 of Smith). Thus, not only does Smith not teach or disclose a hood comprising a plurality of slits as recited in claims 1 to 3 and 24, but Smith actually teaches away from using plastic for ventilation of a window well thereby discouraging one skilled in the art to combine Gust with Smith.

It is further respectfully submitted that there also is no reason or motivation to modify Gust to incorporate the features of LaBrosse as asserted in the Office Action. First, LaBrosse does not at all relate to window well covers nor even to window wells or windows. Rather, LaBrosse “relates to a device for releasing trapped moisture sealed within a structure by a STYROFOAM-backed exterior insulation and finishing system” (Labrosse, col. 1, lines 7 to 10). Second, it is respectfully submitted that the motivation asserted in the Office Action is misplaced since Smith clearly addresses the problem of protecting against the ingress of rain “by virtue of

the periphery of the cover overlying the upper edge of the side wall 32” and because “the side wall by reason of its upwardly and outwardly flaring contour overhangs and projects laterally beyond the rim 24”. (Smith, col. 3, lines 14 to 21).

Withdrawal of the rejection of claims 1, 2, 3, 24 and 30 under 35 U.S.C. §103(a) as being unpatentable over Gust (US 3,123,868) in view of Smith (US 3,046,613) and LaBrosse (US 6,052,959) is therefore respectfully requested. As claims 4, 6, 9, 12 and 25 depend from and incorporate the limitations of claim 1, claims 7, 13 and 15 depend from and incorporate the limitations of claim 2, and claims 8, 14 and 16 depend from and incorporate the limitations of claim 3, withdrawal of the Examiner’s rejection of these claims is also respectfully requested.

With further respect to claims 12 to 14, which recite “wherein the hood is constructed by injection molding”, it is respectfully submitted that these claims claim a product-by-process, and that the recitation of an injection molding process must be accorded patentable weight because a window well cover manufactured via injection molding as claimed *is substantially different in structure* from the window well covers in the applied prior art. *MPEP 2113*. As explained in *MPEP 2113*:

The **structure** implied by the process steps **should be considered** when assessing the patentability of product-by-process claims over the prior art, especially where the product can only be defined by the process steps by which the product is made, or where the manufacturing process steps would be expected to impart distinctive structural characteristics to the final product.

Neither Gust, Smith nor LaBrosse teach or disclose using an injection molding process. Withdrawal of the rejections to claims 12 to 14 under 35 U.S.C. §103(a) as being unpatentable over Gust in view of Smith and LaBrosse is therefore respectfully requested for this reason as well.

With further respect to claims 15 and 16, which recite “wherein the second outward rim flange covers the entire window well”, it is respectfully submitted that Gust does not teach or disclose an outward rim flange that covers the entire window well as claimed, as asserted in the

Office Action. Flange 15 in Gust circumferentially *extends from the outer periphery* of bar 13, which is substantially T-shaped in cross section. (Gust, col. 1, lines 68 to 72 and Figs. 2 and 4). Flange 15 in Gust does **not** cover the entire window well. Withdrawal of the rejections to claims 15 and 16 under 35 U.S.C. §103(a) as being unpatentable over Gust in view of Smith and LaBrosse thus is respectfully requested for this reason as well.

### **The Rejection of Claim 31 in view of Gust, Smith and LaBrosse**

Claim 31 also stands rejected under 35 U.S.C. §103(a) as being unpatentable over Gust (US 3,123,868) in view of Smith (US 3,046,613) and LaBrosse (US 6,052,959).

Claim 31 recites: “A protector for a window well comprising:

a hood formed in the shape of quarter sphere comprising a first and second portion, the first portion of the hood about perpendicular to a base and further comprising a plurality of slits, the second portion sloped to deflect precipitation from the first portion and the slits;  
a hinge coupled to the second portion.”

As such, it is respectfully submitted that, for at least the reasons set forth above with regard to claims 1 to 3, 24 and 30, the Examiner’s rejection of claim 31 should be withdrawn.

### **The Rejection of Claims 32, 33, 35 and 36 in view of Gust, Smith and LaBrosse**

Claims 32, 33, 35 and 36 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Gust (US 3,123,868) in view of Smith (US 3,046,613) and LaBrosse (US 6,052,959).

Claims 32, 33, 35, and 36 recite:

“32. The protector of claim 2, further comprising a hinge secured to the first outward rim flange.”

“33. The protector of claim 3, further comprising a hinge secured to the first outward rim flange.”

“35. The protector of claim 24, further comprising a hinge secured to the first outward rim flange.”

“36. The protector of claim 30, further comprising a hinge secured to the first outward rim flange.”

For the reasons set forth above with regard to claims 2, 3, 24 and 30, withdrawal of the rejection of claims 31, 32, 33, 35 and 36 under 35 U.S.C. §103(a) as being unpatentable over Gust in view of Smith and LaBrosse is respectfully requested.

In addition, it is respectfully submitted that Smith does not teach or disclose “a hinge secured to the first outward rim flange” as claimed. Rather, in Smith, “cover 34 is provided with an embracing metallic reinforcing rim 44 which is C-shaped in cross section and which is received in a channel member 46 carried by a bracket 48 which is secured as by bolts 50 to the wall 10.” (Smith, col. 3, lines 7 to 11). Reinforcing rim 44 is not an outward rim flange.

Withdrawal of the rejection of claims 32, 33, 35 and 36 under 35 U.S.C. §103(a) as being unpatentable over Gust in view of Smith and LaBrosse thus is respectfully requested for this reason as well.

**The Rejection of Claims 1, 2, 4 to 7, 9, 10, 12, 13, 15, 24, 25,  
26, 28 and 30 in view of Mackes, Smith and LaBrosse**

Claims 1, 2, 4 to 7, 9, 10, 12, 13, 15, 24, 25, 26, 28 and 30 were rejected under 35 U.S.C. §103(a) as being unpatentable over Mackes (US 4,330,500) in view of Smith (US 3,046,613) and LaBrosse (US 6,052,959).

In rejecting these claims, the Examiner recognizes that Mackes fails to disclose the claimed plurality of slits in the hood, and looks to Smith and LaBrosse to cure this deficiency

Mackes (US 4,330,500) purports to describe methods of manufacturing a double-flanged window well cover. Mackes explains “Since prior producers of window well covers from drawn

thermoplastic sheets have been unable to produce a base flange, the unit has a reinforcing strip 28 at the base edge 20'." (Mackes, col. 3, lines 60 to 64). Smith (US 3,046,613) and LaBrosse (US 6,052,959) are discussed above.

It is respectfully submitted that it would not have been obvious to one having ordinary skill in the art at the time of the invention to modify Mackes's protector to show a plurality of slits in view of Smith and LaBrosse as asserted in the Office Action.

Smith does not teach or disclose a "first portion of the hood . . . comprising a plurality of slits" as claimed. Rather, Smith clearly states that "it is preferred that the side wall 32 shall be of a perforated metallic material . . . having apertures, passages, or slots therethrough of a screen-like or grid-like character." Moreover, in the arrangement of Figure 5 of Smith, ventilation of the window well is not provided for at all since a "plastic inner wall serves to close the perforations in the outer wall and thus completely protect the window well from ingress of rain, snow or the like" (Smith, col. 3, lines 71 to 74). Thus, not only does Smith not teach or disclose a hood comprising a plurality of slits as claimed, but Smith actually teaches away from using plastic for ventilation of a window well thereby discouraging one skilled in the art to combine Mackes with Smith.

It is further respectfully submitted that there also is no reason or motivation to modify Mackes to incorporate the features of LaBrosse as asserted in the Office Action. First, LaBrosse does not at all relate to window well covers nor even to window wells or windows. Rather, LaBrosse "relates to a device for releasing trapped moisture sealed within a structure by a STYROFOAM-backed exterior insulation and finishing system" (LaBrosse, col. 1, lines 7 to 10). Second, it is respectfully submitted that the motivation asserted in the Office Action is misplaced since Smith clearly addresses the problem of protecting against the ingress of rain "by virtue of the periphery of the cover overlying the upper edge of the side wall 32" and because "the side wall by reason of its upwardly and outwardly flaring contour overhangs and projects laterally beyond the rim 24" (Smith, col. 3, lines 14 to 21).



Withdrawal of the rejections of claims 1, 2, 24 and 30 under 35 U.S.C. §103(a) as being unpatentable over Mackes (US 4,330,500) in view of Smith (US 3,046,613) and LaBrosse (US 6,052,959) is therefore respectfully requested. As claims 4 to 7, 9, 10, 12, 13, 15, 25, 26 and 28 each depend from one of claims 1, 2 and 24, withdrawal of the rejection of these claims is also requested.

With further respect to claims 5, 25 and 28, Smith teaches that the screen is provided as a separate piece from the hood, as clearly shown in all of the Figures of Smith. Thus, even if one were to modify Mackes in accordance with Smith, and then Smith according to LaBrosse, the result would be a multi-piece window well cover, and not the single piece window well cover as claimed.

With further respect to claims 12 and 13, which recite “wherein the hood is constructed by injection molding”, it is respectfully submitted that these claims claim a product-by-process, and that the recitation of an injection molding process must be accorded patentable weight because a window well cover manufactured via injection molding as claimed *is substantially different in structure* from the window well covers in the applied prior art. *MPEP 2113*. Neither Mackes, Smith nor LaBrosse teach or disclose using an injection molding process. Withdrawal of the rejections to claims 12 and 13 under 35 U.S.C. §103(a) as being unpatentable over Mackes in view of Smith and LaBrosse thus is respectfully requested for this reason as well.

With further respect to claim 15, which recites “[t]he protector as described in claim 2 wherein the second outward rim flange covers the entire window well”, it is respectfully submitted that Mackes does not teach or disclose an outward rim flange that covers the entire window well as claimed. Reinforcing strip 28 at the base edge 20' of Mackes is not an outward rim flange that covers the entire window well as asserted in the Office Action. Withdrawal of the rejection of claim 15 under 35 U.S.C. §103(a) as being unpatentable over Mackes in view of Smith and LaBrosse thus is respectfully requested for this reason as well.

**The Rejection of Claims 3, 8, 11, 14, 16, 27 and 33  
in view of Mackes, Smith, Hoyt and LaBrosse**

Claims 3, 8, 11, 14, 16, 27 and 33 were rejected under 35 U.S.C. §103(a) as being unpatentable over Mackes (US 4,330,500) in view of Smith (US 3,046,613), Hoyt (US 3,413,769) and LaBrosse (US 6,052,959).

Claim 3 recites: “A protector for a window well comprising:  
a hood formed in the shape of quarter sphere comprising a first and second portion, the first portion of the hood about perpendicular to a base and further comprising a plurality of slits, the second portion sloped to deflect precipitation from the slits;  
a first outward rim flange extending from the top of the hood for securing the hood to a foundation and comprising a plurality of securing members; and  
a second outward rim flange extending from the bottom of the hood for covering the window well.”

Mackes (US 4,330,500), Smith (US 3,046,613) and LaBrosse (US 6,052,959) are discussed above.

Hoyt (US 3,413,769) purports to describe a basement drain. In Hoyt, holder 94 “is an elongated piece of material suitably fixed to an inner wall having an outwardly extending flange 98 under which the upper end 80 of the passage-forming member 40 is tucked under during installation” (Hoyt, col. 2, lines 35 to 39).

It is respectfully submitted that it would not have been obvious to one having ordinary skill in the art at the time of the invention to modify Mackes’s protector to show a plurality of slits in view of Smith, Hoyt and LaBrosse as asserted in the Office Action. As discussed above with respect to claims 1, 2, 24 and 30, Smith does not teach or disclose a “first portion of the hood about perpendicular to a base and further comprising a plurality of slits” as claimed and there is no reason or motivation to modify Mackes to incorporate the features of LaBrosse as asserted in the Office Action.

Moreover, it is further respectfully submitted that Hoyt does not teach or disclose “a first outward rim flange extending from the top of the hood for securing the hood to a foundation and comprising a plurality of securing members as claimed, as asserted in the Office Action. Passage-forming member 40 of Hoyt is not a window well hood.

Withdrawal of the rejection of claim 3 under 35 U.S.C. §103(a) as being unpatentable over Mackes (US 4,330,500) in view of Smith (US 3,046,613), Hoyt (US 3,413,769) and LaBrosse (US 6,052,959) is therefore respectfully requested. As claims 8, 11, 14, 16, 27 and 33 depend from claim 3, withdrawal of the Examiner’s rejection of these claims is also requested.

With further respect to claim 16, which recites “[t]he protector as described in claim 3 wherein the second outward rim flange covers the entire window well”, it is respectfully submitted that Mackes does not teach or disclose an outward rim flange that covers the entire window well as claimed. Reinforcing strip 28 at the base edge 20' of Mackes is not an outward rim flange that covers the entire window well as asserted in the Office Action. Withdrawal of the rejection of claim 16 under 35 U.S.C. §103(a) as being unpatentable over Mackes in view of Smith, Hoyt and LaBrosse thus is respectfully requested for this reason as well.

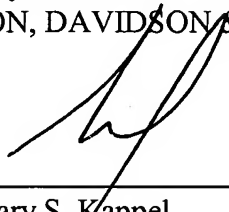
With further respect to claim 33 which recites: “The protector of claim 3, further comprising a hinge secured to the first outward rim flange”, it is respectfully submitted that Smith does not teach or disclose “a hinge secured to the first outward rim flange” as claimed. As discussed above, reinforcing rim 44 of Smith is not an outward rim flange. Withdrawal of the rejection to claim 33 under 35 U.S.C. §103(a) as being unpatentable over Mackes in view of Smith, Hoyt and LaBrosse thus is respectfully requested for this reason as well.

Conclusion

The present application is respectfully submitted as being in condition for allowance and applicants respectfully request such action.

Respectfully submitted,  
DAVIDSON, DAVIDSON & KAPPEL, LLC

By

  
\_\_\_\_\_  
Cary S. Kappel  
Reg. No. 36,561

Davidson, Davidson & Kappel, LLC  
485 Seventh Avenue, 14<sup>th</sup> Floor  
New York, New York 10018  
(212) 736-1940